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Supreme Court of the United States

OCTOBER TERM, 1966

NO. 737

BLOOMFIELD STEAMSHIP COMPANY, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For The Fifth Circuit

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v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For The Fifth Circuit

Bloomfield Steamship Company (hereinafter "Bloomfield") prays that a writ of certiorari issue to review the judgment of the United States Court or Appeals entered in the above cause on August 4, 1966.

OPINIONS BELOW

The opinion of the Court of Appeals (Tuttle, C. J.) is reported at 359 F.2d 506 and also appears in the appendix to this petition.

The opinon of the District Court (Noel, D. J.) is not reported; it appears in the appendix to this petition.

JURISDICTION

The original judgment of the Court of Appeals was entered on April 29, 1966, and by its order of May 19, the Court extended time for the filing of a petition for rehearing until June 6, 1966. The petition was timely filed on June 4, and denied by an order made on August 4, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. The Cargo Preference Act requires that 50% of foreign aid cargo be shipped in "United States-flag commercial vessels to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels."

Did rates for wheat so required to be shipped U.S.-flag, rates expressly found and conceded to be "fair and reasonable," become unlawful when it appeared that the carrier, to meet foreign flag competition, charged lower rates for the carriage of grain not required to be shipped U.S.-flag?

2. The regulations of the International Cooperation Administration ("ICA") required ocean carriers to certify that a rate charged on an ICA financed shipment of wheat did not exceed its rate paid to it for "similar ocean transportation services *by other customers similarly situated.*"

Are "other customers" who ship agricultural commodities not required to be shipped U.S.-flag "similarly situated" to those who ship Government-aided agricultural commodities required to be shipped U.S.-flag?

3. Is the general language of the Shipping Act of 1916 applicable to matters arising under the specific Cargo Preference Act?

4. According to the evidence and the findings of the District Court, ICA, specifically and in advance approved the rates at issue here, and for many years Congress, the Comptroller-General, other interested Government agencies and, in at least one instance, the courts have recognized that U.S.-flag rates under the Cargo Preference Act substantially exceed foreign flag rates for agricultural commodities, and the Department of Agriculture, under whose programs the commodity here involved (wheat) is principally shipped, have recognized the "U.S.-flag differential" in official forms and regulations and has at least in some instances itself approved the shipment of bulk agricultural commodities (grains) required to be shipped U.S.-flag at U.S.-flag differential rates. R. 42, 67-75.

Is it in accordance with the equitable principles of the law of restitution now to permit the Government to recover back the "U.S.-flag differential" because Bloomfield carried commodities not required to be shipped U.S.-flag at foreign flag rates?

STATUTES AND REGULATIONS INVOLVED

Cargo Preference Act, 46 U.S.C. §1241(b) (sometimes referred to as "Public Law 664"; it was Public Law 664 of the 83d Congress):

> "§1241. Transportation in American vessels of Government personnel and certain cargo . . .
>
> "(b) Whenever the United States . . . furnish to or for the account of any foreign nation without provision for reimbursement, any equipment, materials, or commodities, within or without the United States, . . . the appropriate agency or agencies shall take such steps as may be necessary and practicable to assure

that at least 50 per centum of the gross tonnage of such equipment, materials, or commodities (computed separately for dry bulk carriers, dry cargo liners, and tankers), which may be transported on ocean vessels shall be transported on privately owned United States-flag commercial vessels, to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels . . ."

Agricultural Trade Development and Assistance Act, 7 U.S.C. §1702(a), Act of October 8, 1964 (involved only as evidencing Congressional recognition of the U.S.-flag differential):

". . . The Commodity Credit Corporation shall finance ocean freight charges incurred pursuant to agreements entered into after December 31, 1964, only to the extent that such charges *are higher* (than would otherwise be the case) by reason of a requirement that the commodities be transported in United States-flag vessels. . ."

Regulations of the United States Department of Agriculture (as in effect in 1958 and 1959; §11.12 has not differed in respects relevant here since originally promulgated in 1954 to the present day):

"§11.12(b). *Where it is required that the commodity be shipped on a United States-flag vessel, CCC Form 106 will set forth the amount of the ocean freight differential, if any, which CCC will recognize as existing between the prevailing foreign-flag vessel rate and the United States-flag vessel rate.*"

Regulations of the International Cooperation Administration:

"§201.6. General provisions deemed incorporated in PAs and PIOs.

. . .

"(n) U.S.-flag vessel shipping requirement — (1) Scope of cooperating country responsibility. The cooperating country will ensure that at least 50 percent of the gross tonnage of all ICA-financed commodities . . . is transported on privately-owned U.S.-flag commercial vessels . . ." [involved in that in the contract with West Germany under which the shipments here at issue were made the requirement to ship 50% U.S.-flag was expressed by a reference to this regulation followed by I.C.A.'s undertaking to reimburse West Germany the differential rate; see pagee 20 and 53a]

"§201.7. Ocean transportation.

. . .

"(b) Rate limitations. The rate charged by a supplier of ocean transportation services shall not exceed the prevailing rate for similar freight contracts nor the rate paid to the supplier for similar ocean transportation services by other customers similarly situated."

§§*16 and 17 of Shipping Act of 1916*, 46 U.S.C., §§815 and 816:

"§16. It shall be unlawful for any common carrier by water . . .

"First: To make or give any *undue or unreasonable* preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever . . ."

"§17. No common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is *unjustly discriminating* between shippers . . . "

Other statutes involved, although their meaning is not at issue, are:

"Public Law 480," or "P.L. 480," viz., the Agricultural Trade Development and Assistance Act, 7 U.S.C. §§1691-1736; the Act of July 10, 1954; 68 Stat. 459. This statute includes four Titles, each authorizing a different category of programs for the use of agricultural commodities in foreign aid. These programs are administered by the Department of Agriculture and the Commodity Credit Corporation ("CCC"). This statute was Public Law 480 of the Eighty-Third Congress.

The Mutual Security Act of 1954, 22 U.S.C. §1922; Act of August 26, 1954, 68 Stat. 843. This statute also authorizes programs for the use of agricultural commodities in foreign aid. These programs were administered during the shipments at issue here by the agency then known as International Cooperation Administration ("ICA"), now Agency for International Development.

STATEMENT OF THE CASE

The Rate Differential in Agricultural Commodities Created by the Cargo Preference Act

We have stated the questions in the case in legal terms. In practical terms the question is this: Does a U.S.-flag carrier of agricultural commodities who has been paid fair and reasonable rates within the meaning of the Cargo Preference Act for cargoes of agricultural commodities required to be shipped U.S.-flag forfeit the differential by which those rates exceed world market rates if to utilize vacant ship space he carries at world market rates agricultural commodities not required to be shipped U.S.-flag?

Since the enactment of the Cargo Preference Act there has existed a universally recognized rate differential in the shipment of agricultural commodities, including wheat, from the United States to foreign countries: one set of rates for the 50% of Government-aided agricultural commodities required by that act to be shipped in U.S.-flag ships and a different and lower set for those not so required (those not so required consisting of the remaining 50% of Government-aided agricultural commodities and agricultural commodities shipped commercially).

With respect to agricultural commodities, including wheat, with which this case is concerned, Government-aided shipments and the consequent demand for cargo space have been enormous. Government-aided shipments of agricultural commodities have been primarily under Title I of Public Law 480; shipments under Titles II, III and IV of Public Law 480 and under the Mutual Security Act of 1954 have been substantial but relatively insignificant compared with those under Title I, Public Law 480.[1]

As the Cargo Preference Act has required that 50% of these shipments be in U.S. flag ships, and as the U.S. merchant marine is less than 10% of the world shipping fleet,

---

[1] According to CCC's "Summary of 30 Years' Operations," published in 1964 (page 43):

> "For all Public Law 480 programs, CCC provides surplus commodities for shipment abroad . . .
>
> "Since 1954, more than 116 million tons of American farm products have moved to foreign consumers in commercial sales, donations, and other provisions of the Act. This has included 3 billion bushels of wheat and wheat products . . . 8.7 million bales of cotton . . . 100 million bags of rice, 6.6 billion pounds of vegetable oil, 477 million bushels of feed grains . . ."

Additionally CCC shipped abroad 2,263,147,729 bushels of wheat between 1949 and 1964 under the International Wheat Agreement of 1949. "Summary," page 41.

infra page 14, the natural operation of the law of supply and demand has resulted in rates for agricultural commodities, including wheat, on U.S.-flag ships that are far higher than world market rates.

This U.S.-flag differential has been recognized by all concerned—most of all by the Government agency primarily concerned with the shipment abroad of Government-aided agricultural commodities, viz., the Department of Agriculture, but also by Congress, the Comptroller-General, the Department of Commerce, the Maritime Administration, the Interagency Maritime Task Force, and other agencies, including ICA in the very contract with the Federal Republic of Germany under which the shipments of wheat at issue here were made, and by the Attorney-General. According to CCC, *infra* page 14, the U.S.-flag differential rate is about twice the foreign flag rate.

Obviously a carrier under these circumstances would prefer to carry Government-aided agricultural commodities required to be shipped U.S. flag, but, despite their volume, these are not always available, nor is other, general, cargo. Indeed because world market rates on agricultural commodities are fixed by foreign flag tramps, exceedingly low cost operators, the lowest in the world in fact, agricultural commodities at world market rates are highly unrewarding cargo. A U.S.-flag line would accept them only if desperate to fill an otherwise partially empty ship.

Because Bloomfield accepted agricultural commodities at the world market rate at a time when it was also carrying such commodities (wheat) at the U.S.-flag rate, the Court of Appeals has held that it was guilty of unlawful discrimination.

We shall now demonstrate our assertion that a U.S.flag differential on agricultural commodities required, to be shipped U.S.-flag was consciously enacted and kept by Congress and recognized and administrered by all interested Government agencies and the courts. Not only was there no warning that the differential would be forfeited by the carriage of commodities not required to be shipped U.S.-flag at world market rates, but the record here establishes that CCC was simultaneously approving the carriage of bulk agricultural commodities required to be shipped U.S.-flag at differential rates and the carriage on foreign-flag vessels of like commodities at foreign flag rates. R. 42, 67-75.

According to the Attorney-General, Congress recognized that the Cargo Preference Act would cause, and, later, that it had caused a U.S.-flag differential on agricultural commodities, but nevertheless it enacted the Cargo Preference Act and subsequently refused to repeal it. The attitude of Congress respecting the U.S.-flag differential on agricultural commodities has been well stated by the Attorney-General in an opinion he rendered to the Secretary of Agriculture on August 29, 1963 (42 Op. Atty. Gen., Op. No. 14). The question was whether sales of agricultural commodities under Title IV of Public Law 480 fell within the Cargo Preference Act. In the course of the opinion the Attorney-General said (42 Op. Atty. Gen., Op. No. 14, page 14):

> "The discussions of the Cargo Preference Act before the House Committee on Merchant Marine and Fisheries show a recognition of the fact that the act would cover the shipment of surplus commodities. *It was realized that the cargo preference requirement with respect to the disposition of agricultural surplus com-*

modities under Public Law 480 would increase the ocean shipping charges . . .

"In 1956, the Senate Committee on Agriculture and Forestry inserted in S. 3183, one of the bills which finally resulted in the Agricultural Act of 1956 (70 Stat. 188), *a section 307 which would have exempted transactions under title I of Public Law 480 from the Cargo Preference Act* (S. Rept. 1484, 84th Cong., 2d sess., pp. 25-27). *This section was eliminated from the bill after a prolonged and searching debate on the floor of the Senate* (102 Congressional Record, 4975-4991). During the same session of Congress, the Senate Committee on Interstate and Foreign Commerce and the House Committee on Merchant Marine and Fisheries held lengthy hearings on the same question and concluded that there was no reason to exempt shipments under title I of Public Law 480 from the coverage of the Cargo Preference Act [citing hearings on S. 2584 of the 84th Congress, which also would have repealed cargo preference on Title I, Public Law 480 programs]."

[Because agricultural commodities carried under Title I, Public Law 480, exceed many times over those carried under other statutory authorizations, the practical effect of eliminating Title I, Public Law 480, agricultural commodities from the Cargo Preference Act would have been to repeal the rate differential. The remaining agricultural commodities would not have been sufficiently substantial in relative volume to have brought about a U.S-flag rate appreciably higher than the world market rate.]

In the "prolonged and searching debate on the floor of the Senate" the proponents of repeal of cargo preference, such as Senator Aiken of Vermont and Senator Mundt of South Dakota, forcefully made the point of increased cost

of ocean transportation. The advocates of cargo preference, including Senator Butler of Maryland and Senator John F. Kennedy of Massachusetts, did not deny the existence of rate differentials brought about by the Cargo Preference Act. Nevertheless the Cargo Preference Act repealer was eliminated from the bill by a vote of 57 to 23 on March 16, 1956 (102 Congressional Record, 4991).

S. 2584 of the 84th Congress, also providing for such repeal, never got out of Committee. Since the 84th Congress no bill has been introduced to repeal or modify the Cargo Preference Act.

We could cite many passages from Congressional hearings and reports showing that Congress was aware of the effect, both as anticipated and as realized, of cargo preference on ocean transportation rates on agricultural commodities, but as the Attorney-General put it so well in an official opinion, further elaboration seems unnecessary.

We do, however, note that at a hearing before the House Merchant Marine Committee on February 10, 1955, Mr. Arthur G. Syran, Director, Office of Transportation, Foreign Operations Administration, the name of ICA at that time, showed complete familiarity with U.S.-flag rate differentials and indeed introduced in evidence a rather elaborate table showing the rate differentials on grain shipped to Yugoslavia (page 50). Representatives of other interested Government agencies also showed such familiarity. These hearings and the Committee's subsequent report were referred to and relied on both by the Attorney-General in the opinion quoted from *supra* page 9, and by the District Judge in upholding Bloomfield's complaint (R. 381-391).

We must also mention that on October 8, 1964, Congress enacted a provision that in Public Law 480 programs CCC should pay *only* the U.S.-flag differential, *supra* page 4, certainly recognition that there was one.

The Department of Agriculture formalizes U.S-flag differentials. The Government agency administering by far the largest foreign aid programs relating to agricultural commodities, including wheat, that is to say, those under Public Law 480, is the Department of Agriculture, particularly its unit CCC.

Soon after the enactment of the Cargo Preference Act the Department of Agriculture on November 22, 1954 issued Regs. §11 (7 C.F.R. 11). §11.12, entitled, Ocean Transportation, providing for a "Form 106" on which there was to be stated, in those cases in which the Department, pursuant to the Cargo Preference Act, had required U.S. flag shipment, the "ocean freight differential . . . between the prevailing foreign-flag vessel rate and the United States-flag vessel rate." The Department undertook to reimburse the supplier the amount of the "ocean freight differential."

We set forth below the relevant sections of Form 106. The form itself is, of course, blank, but for purposes of illustration we have filled it in with material, in brackets, extracted from the form 106 before the Court in *Cargo & Tankship Management Corp. v. India Supply Mission v. United States*, 221 F.Supp. 680 (S.D.N.Y.), modified 336 F.2d 416, in which the Court of Appeals of the Second Circuit enforced a U.S. flag differential against the Government; cf. *infra* page 18.

FORM CCC-106-2
(Rev. 4-7-64)

U. S. DEPARTMENT OF AGRICULTURE
Commodity Credit Corporation

ADVICE OF VESSEL APPROVAL (OCEAN CARRIER)

NO. (17,489)

DATE OF ISSUANCE (May 31, 1962)

DATE OF FIRST APPROVAL (March 12, 1962)

The fixture described below is hereby approved as requested under the applicable provisions of Public Law 480 and specifically covered by the purchase authorization shown at right. Make no changes on this form. Should changes become necessary, communicate immediately with the office shown in the approval space for appropriate instructions.

COUNTRY (India)

PURCHASE AUTHORIZATION NO. (39-65 01)

P.L. 480 PROGRAM (Check one)
TITLE I ☐ TITLE IV ☐

NAME AND ADDRESS OF SUPPLIER OF COMMODITY
(Continental Grain Co.
2 Broadway
New York 4, New York)

TYPE OF VESSEL (Check one)
LINER ☐ TANKER ☐ DRY BULK CARRIER ☒

NAME OF VESSEL (SS "MOUNT EVANS)

FLAG OF VESSEL U.S.

COMMODITY (Wheat)

APPROXIMATE WEIGHT OF COMMODITY (Long tons) (1,000 Long Tons)

LOADING RANGE (U.S. Gulf Coast)

ESTIMATED LOADING DATE(S) (April 15 - May 18, 1962)

DESTINATION (Vizagapatan and Calcutta, India)

LOADING COSTS TO BE PAID BY (Check one) VESSEL ☒ SHIPPER ☐

DISCHARGE COSTS TO BE PAID BY (Check one) VESSEL ☐ CONSIGNEE ☒

OCEAN FREIGHT RATE ($28.00) PER (Long Ton)

OCEAN FREIGHT DIFFERENTIAL $ (18.27) PER (Long Ton)

REMARKS: differential

Ocean freight to be financed by CCC ☒ Ocean freight not to be financed by CCC ☐
Notice of arrival is required ☐ Notice of arrival is not required ☒

(Ocean freight to be financied by CCC.
Notice of arrival is required.)

(The differential as stated on this Form 106 is final for this shipment and is not subject to adjustment.)

(This supersedes CCC Form 106 Number 17,489 issued on March 30, 1962.)

APPROVED

U. S. Department of Agriculture
Foreign Agricultural Service
Program Operations Division
Washington, D.C. 20250

FOR: (Director, Program Operations Division)

THIS ADVICE SENT TO

INSTRUCTIONS: The signed original of this form must be submitted with the first request for reimbursement in connection with the above-described shipment.

ORIGINAL

Thus from the very inception of operations under the Cargo Preference Act the Department recognized that there was a "foreign-flag vessel rate" and a "United States-flag vessel rate" and a difference between them called the "ocean freight differential."

In its "Summary of 30 Years' Operations," CCC said (page 48):

> "The CCC pays certain ocean transportation for commodities shipped on U.S.-flag vessels . . .
>
> "With use of both U.S. and foreign vessels, this is a complicated task. Provisions of the Cargo Preference Act must be followed, which direct that U.S.-flag vessels must be used for at least 50 percent of the tonnage shipped. *The great variance between U.S.-flag rates and foreign flag rates requires careful analysis.*
>
> "Under Title I and Title IV of P.L. 480, CCC *pays the difference between U.S.-flag rates and foreign flag rates on the U.S.-flag vessels required to be used, or about half the costs.*"

In order to ascertain the differential between U.S.-flag rates and foreign flag rates on grains being shipped steadily and in large quantities, and also because CCC was shipping equally large quantities of agricultural commodities at foreign-flag rates, it was of course necessary for CCC officials to keep closely informed of day to day fluctuations both in U.S.-flag rates and foreign flag rates. The record shows in some detail how this was done (R. 186-189; 247-251).

Further recognition. On May 17, 1965, the Department of Agriculture issued a statement "in answer to the complaints made by the maritime interests with respect to the handling of ocean transportation."

Inter alia the Department said:

> "Cargo preference results in very substantial Government costs that would not otherwise be incurred . . . [CCC] costs for cargo preference will be reduced by the new provision of law enacted last year [referring to the Act of October 8, 1964; 7 U.S.C. §1702(a), supra, page 4] which will limit [CCC] financing of ocean freight on Title I cargoes to the differential by which the ocean freight on United States-flag vessels exceeds the rate on foreign flag vessels . . ."

The Comptroller-General recognizes the U.S. flag differentials. On September 23, 1958, while some of the shipments here at issue were being made, the Comptroller-General addressed a letter to the Secretary of Agriculture, saying in part (38 Comp. Gen. 229):

> "You advise that in carrying out programs involving the exportation of surplus agricultural commodities and products thereof, pursuant to the Agricultural Trade Development and Assistance Act of 1954, as amended, Public Law 480, 83rd Congress, your Department aids in financing the cost of ocean transportation; but, generally, this is limited to payment by the Commodity Credit Corporation to private exporters of the additional costs of freight moving on American vessels as required by the Cargo Preference Act over what would have been the cost had the freight moved on foreign flag vessels."

The rest of the letter, on the foregoing premise, classifies various types of vessels for purposes of the Cargo Preference Act.

Under the Budget and Accounting Act, 1921, and the Accounting and Auditing Act, 1950 (31 U.S.C. §§53, 67)

the Comptroller-General audits the books of the agencies of the Executive Branch. No record has been found of any criticism by him of the payment of U.S. flag differentials.

The Department of Commerce recognizes the U.S.-flag rate differential. In a "Review of Direct and Indirect Types of Maritime Subsidies with Special Reference to Cargo Preference Aid" submitted by the Secretary of Commerce to the President of the United States on April 20, 1956, the Secretary said (page 16):

> ". . . [F]oreign governments making agreements with the United States regarding surplus agricultural products are not charged for any portion of the ocean transportation cost resulting from the use of United States flag vessels to the extent that the rates of those vessels exceed the rates that would have been paid to foreign flag vessels for the same transportation service."

The Maritime Administration recognizes the U.S.-flag differential. In a report submitted on November 19, 1965 by the Maritime Administrator to the Joint Economic Committee of Congress, the Administrator said (page vi):

> "The total value of freight payments for the movement of Public Law 480 cargoes [which are necessarily agricultural commodities, supra page 6] amounted to almost $222 million. This includes more than $81 million in rate premiums which represents the difference between world market rates and the rate required by U.S.-flag ships."

At the hearing before the House Merchant Marine Committee in 1955 referred to in the opinion of the District Judge (R. 381-389; 20a-28a) it was suggested that the

maritime administration, as the Government agency most familiar with the maritime affairs, issue advices to other Government agencies from time to time as to "fair and reasonable rates for United States-flag commercial vessels." Responsive to this suggestion the Maritime Administration did issue such advices. The last such advices, issued shortly prior to the time of the first of the shipments at issue here, was that for shipments from the U.S. Gulf to "Bremen/Hamburg/Emden" the "fair and reasonable rates for United States-flag commercial vessels" were $16.02 winter loadline and $15.83 summer loadline.*

These rates are, of course, much higher than those charged on any of the shipments at issue here and almost three times what were then foreign flag rates, as the Maritime Administration presumably knew.

The Interagency Maritime Task Force recognizes U.S.-flag differentials. Last year there was an "Interagency Maritime Task Force" headed by the Under Secretary of Commerce for Transportation, and including representatives of the Departments of State, Defense, Agriculture, and Labor, and of the Bureau of the Budget, the Council of Economic Advisers, the Federal Maritime Commission and the Maritime Administration. This Task Force said in its Report (page 35):

> "American-flag ships at present carry about 7 million tons annually [in United States foreign trade in dry bulk cargoes], practically all of which is cargo preference cargo moving under P.L. 480 and *reserved to U.S.-flag ships at rates much higher than world rates.*"

* For full cargo lots on certain type U.S.-flag vessels. The rates for cargo lots do not differ substantially from, and are certainly not substantially higher than, those for parcel shipments.

The Task Force deplored the small proportion of United States foreign trade in commercial dry bulk cargoes carried by U.S. flag ships—a point of view not advanced by the decision of the Court of Appeals.

The Courts enforce a U.S.-flag differential. In *Cargo & Tankship Management Corp. v. India Supply Mission v. United States*, 221 F.Supp. 680 (S.D.N.Y.), modified 336 F.2d 416 (C.A.2d), all parties, including the United States, and both courts took the validity of the "ocean freight differential" for granted; the controversy concerned the adjustment of claims in the light of an unexpected event, viz., the ship's breakdown and the consequent transshipment of the cargo of wheat to a foreign flag vessel. The District Court described the mechanics of operation of the Cargo Preference Act as follows (221 F.Supp. 682):

> "The charter party was then submittel to CCC. This was required by the Regulations (7 CFR 11.12(a)) which state that approval will be given on 'Form 106', elsewhere defined as 'Advice of Vessel Approval' and designated '106-2' for ocean carriers. In this instance three Advices of Vessel Approval were issued. Each Advice of Vessel Approval stated an 'ocean freight differential', in amount $18.27 for 1,000 tons, $15.84 for 4,370 tons, and $16.20 for 4,970 tons. This differential is that between the foreign-flag freight rate and the United States-flag freight rate and is important because when (as here) it is required that shipment be made in a United States-flag ship, the Regulations are so drawn that the added expense of the differential is not borne by the importing country but the United States."[2]

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[2] It is a commentary on the problems of the U.S. merchant marine that the carrier was in bankruptcy at the time suit was brought. United States District Court, Southern District of New York, Docket #63B-216.

Part of the carriage was by the U. S. flag ship Mount Evans, but because of her breakdown, the cargo was transshipped foreign flag and carried the rest of the way to India. The Court of Appeals held that, at 336 F.2d 421:

> ". . . contrary to the decision of the lower court, respondents (India) are entitled to reimbursement for so much of the freight charges as are attributable to carriage from the gulf port of Galveston to Norfolk, Virginia, the point of transshipment. On this leg of the voyage the cargo was carried in the approved American vessel, S. S. Mount Evans. . . . [T]he general purpose of the American flag vessel requirement, the promotion of American shipping, was served here to the extent of the carriage to Norfolk and the freight charges so occasioned."

THE PARTICULAR SHIPMENTS HERE AT ISSUE

The shipments here at issue were of wheat, but unlike most shipments of that commodity were shipped pursuant to an ICA program rather than a CCC or other Department of Agriculture program. As indicated by ICA Regulation 1, §201.6(n), *supra* p. 5, ICA delegates to the beneficiary country the duty to see to it that 50% of the cargo is shipped U.S.-flag, but couples that requirement with its own undertaking to reimburse the beneficiary country the amount of the U.S.-flag differential. Thus in the contract with West Germany under which the shipments here at issue were made it was provided by §3 (53a)

> "3. The Government of the Federal Republic of Germany agrees [to comply with ICA Regulation 1,

> §201.6(n), i.e., to ship 50% U.S. flag]. The ICA will reimburse the Government of the Federal Republic of Germany in Deutsche Mark in the amount *by which the transportation costs incurred for shipment on U. S. flag commercial vessels exceed transportation costs which would have been incurred per shipment as of the same time on non-U. S. flag commercial vessels.*"

The wheat was shipped in bulk, but in so-called "parcel shipments" (less than full ship load). During the period of these shipments Bloomfield also carried parcel shipments of grain to Germany at world market rates.

The rates on the shipments to West Germany sponsored by ICA ($10-$11 per ton; R. 43-50) correspond to those then being approved by CCC for wheat shipments to Poland ($11.18-14.32 per ton for wheat; R. 67-70) and those approved by the Department of Agriculture for wheat shipments to Austria through German ports (R. 42, 75). A number of these shipments to Poland were on Bloomfield's ships, indeed on the same ships that carried the shipments at issue here (the S.S. Neva West, Alice Brown, Margaret Brown and Lucille Bloomfield) (R. 43-50, 67); the rates of these shipments to Poland and Austria have never been challenged.

The rates on the grain taken at world market rates to fill otherwise unused vessel capacity ($4.50-$6.75 per ton; R. 43-50) corresponded generally with the foreign flag rates ($4.69-$6.71 per ton) then being charged for grain shipments to Poland with the approval of CCC for Government-aided grain with respect to which U.S.-flag shipment was not required (R. 71-75).

Advance approval by ICA after prolonged negotiations. Since no one from ICA testified, it is not known whether ICA has a form corresponding to CCC form 106. Nevertheless,

Mr. Arthur S. Mason, Acting Head, Ocean Transportation Branch, Department of Agriculture, testified that he had been consulted respecting the rates on the shipments at issue here and had given his approval of them, usually orally by telephone, to Messrs James and Duane of the ICA office of Transportation. The suggestion that ICA had adopted this sensible and prudent course was angrily rejected by the Government attorneys, who nevertheless failed to call Messrs. James and Duane. According to Mr. Mason, rates tentatively agreed upon in Germany between the German importers and Bloomfield's agents there were substantially reduced as a result of his guidance. The negotiations were long and exhaustive. On this and other evidence reviewed at R. 399-405, the District Judge found as a fact that ICA had given advance approval to these rates (R. 406-407). The Court of Appeals did not disturb this finding. But cf. *infra* page 25.

Should Bloomfield have refused the "commercial" shipments and sailed its ships with empty holds? As already noted, *supra* page 8, agricultural commodities at foreign flag rates are not rewarding cargo. Bloomfield took these shipments only to fill otherwise partially empty ships, and to make sure it was offered Cargo Preference Act cargoes. (Interrogatory 32 to Dunn, R. 81 and 94.) We are unable to see the advantage to the U. S. Government, its merchant marine or to its economy generally to force Bloomfield to reject such shipments—but if such rejection is the price of the continued carriage of agricultural commodities at U. S. differential rates Bloomfield would have no choice.

Bloomfield's agents sign the allegedly false certificate. To obtain payment for the ICA sponsored cargo freights, Bloomfield's agents as required by ICA Regulation 1 sub-

mitted invoices for the amount of the freight moneys due according to the bills of lading to the agent for the cargo (R. 65-66). On the back of each invoice was a printed form, entitled "Supplier's Certificate": the supplier, viz., Bloomfield, certified, among other things, that the rate charged on these shipments did not exceed:

> ". . . the rate paid to the supplier for similar services by other customers similarly situated." (R. 66)

THE SUIT

Bloomfield brought suit against the Government for a declaratory judgment that it had no liability respecting these freight moneys (R. 4-24). The jurisdiction of the District Court was invoked under 28 U.S.C. §1331 and §1345, and also §2201 and §2202 (Declaratory Judgment Act).

The Government answered, with a counterclaim stated to be equitable in nature demanding $270,380 in restitution for alleged overcharges (R. 24-33).

THE DECISION OF THE DISTRICT COURT

The District Court (Noel, D. J.) sustained the complaint and dismissed the counterclaim. Specifically with respect to Bloomfield's rates on the shipments in question, the District Court found (R. 406):

> "1. Such rates were fair and reasonable;
>
> "2. Such rates were not in excess of prevailing rates on shipments under the Cargo Preference Act;
>
> "3. Such rates did not exceed those rates which Bloomfield would have charged other shippers for govern-

ment financed cargoes under the Cargo Preference Act;

"4. Such rates comply with the valid and applicable I.C.A. regulations;

"5. Such rates did not exceed (a) those prevailing for similar freight contracts, nor (b) those paid to suppliers for similar ocean transportation, at or about the same time by other customer's similarly situated;

"6. Those Bloomfield customers which shipped commercial grains on Bloomfield vessels, at rates which the government compared with Bloomfield's rates on government-financed grain shipments in an attempt to establish the illegality of the latter, were not similarly situated to the Bloomfield customers which contracted for the carriage of government-financed grain at rates here in controversy."

THE DECISION OF THE COURT OF APPEALS

The Court of Appeals (Tuttle, C.J.) reversed the judgment on, as we read the opinion, two grounds:

First: A rate for agricultural commodities required to be shipped U.S.-flag higher than for similar agricultural commodities not so required violated §§16 and 17 of the Shipping Act of 1916 forbidding unreasonable preferences.

Second: Bloomfield could "validly agree [by the "Supplier's Certificate"] to carry Government-financed shipments at a charge that was competitive with its charges for commercial shippers", infra, page 7a. There was an "option to the parties to agree that cargoes carried at Government expense shall be charged at rates as low as those carried for other shippers, infra, page 9a. "... [T]here can be no justification for a conclusion that the United States should not be benefited by the contract as written," infra page 8a.

Apparent misapprehensions of the Court of Appeals. The opinion of the Court of Appeals takes for granted that by the "terms of the Supplier's Certificate" Bloomfield agreed to carry the Government-aided wheat required to be shipped U.S. flag at the same rates as it might carry similar cargo not so required.

The opinion regards the question presented by the case as being whether Bloomfield had the legal power to make such a contract and whether the Government could enforce it.

But Bloomfield has at no time denied that it had the legal power to contract to carry the wheat here involved at world market rates, or at 10¢ a ton or $100 a ton.

What counsel for Bloomfield most earnestly contended was that according to federal common law canons of contract interpretation, Bloomfield had not agreed by the Supplier's Certificate to sacrifice the U.S.-flag differential rates which had been so exhaustively negotiated, cf. *supra* page 21, in conformity with Congressional intent and Governmental approval and administrative practice.

"Similar services." In part of its opinion the Court of Appeals seems to imply that Bloomfield's certificate was that it was charging no more than for "similar services." Of course the certificate actually was that the rate was no more than had been paid for "similar ocean transportation services *by other customers similarly situated.*" The clause "by other customers similarly situated" would be redundant if it were not anticipated that some customers would be charged more than others for "similar ocean transportation services." The real question is not whether the services were similar—physically they were—but wheth-

er the customers were "similarly situated." We say that they were not.

Effect of ICA's advance approval of these rates. The opinion of the Court of Appeals reports that "counsel for Bloomfield candidly conceded" that ICA's advance approval of the rates is "significant" only if the Court finds that Bloomfield lacked legal power to charge world market rates on these shipments, infra page 9a. This statement shows that counsel for Bloomfield was unable to convey his meaning to the Court; counsel intended no such concession. We believe this advance approval highly significant as showing that by the Supplier's Certificate the parties did *not* intend that the rates be world market rates and that it will not "give offense to equity and good conscience if [Bloomfield is] permitted to retain [what it collected]." *Atlantic Coast Line v. Florida,* 295 U.S. 301, *infra* page 34.

The "double subsidy" point. The Court of Appeals several times refers to Bloomfield as being "subsidized," apparently referring to the fact that at one time Bloomfield enjoyed an operating-differential subsidy under the Merchant Marine Act of 1936 to equate its seamen's wages with those of its foreign-flag competitors. 46 U.S.C. §1171.

Bloomfield is no longer subsidized.

The point is strictly *ad hominem,* as the Cargo Preference Act refers to "privately owned United States flag-commercial vessels", drawing no distinction between subsidized and non-subsidized carriers, and expressly requiring preferences to "liners," supra, page 4. Most liners are subsidized vessels.

There is no suggestion that Bloomfield made an excessive profit, or indeed, any profit. The Merchant Marine Act

of 1936 provides for the recapture from subsidized operators of profits in excess of a certain amount on the capital investment. 46 U.S.C. §1176.

The remand was to determine "the amount of the charges in excess of the rates charged for similar commercial shipments," and, presumably, to grant judgment for that amount. The Court of Appeals did *not* remand for the determination of what rate would earn a reasonable return upon Bloomfield's invested capital or other standard of value.

The operating-differential subsidy serves only to equate wages (and certain similar expenses) paid by U.S. subsidized lines with those of foreign-flag lines on the same routes. However, foreign-flag vessels, in addition to paying low wages (in relation to United States wages), receive various kinds of assistance from their respective governments.

In a report entitled "Maritime Subsidy Policy" made by the Department of Commerce in 1954, the Department noted:

> ". . . ships under foreign-flag registry are less costly to construct and operate than comparable ships of United States registry. Even with these economic advantages, foreign governments have improved the competitive position of their respective merchant fleets by means of public assistance . . . Some countries provide mail contracts which compensate their ships to a greater degree than if the mail were transported at international rates; provide terminal facilities at low rental rates; or grant general navigation bounties based upon the type of service operated, stipulated ship characteristics, and the number of days operated."

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals has decided an important question of federal law which has not been, but should be settled by this Court.

The decision of the Court of Appeals to deprive a U.S.-flag carrier of differentials to which it is concededly otherwise fully entitled because it has carried at world market rates agricultural commodities not required to be shipped U.S.-flag conflicts with applicable decisions of this Court in the respects hereinafter stated. Additionally that decision, we submit:

1. Misconstrues the Cargo Preference Act;

2. Frustrates the purpose of the Cargo Preference Act to assist the U.S. merchant marine by attaching an unreasonable and inconsistent condition to its benefits;

3. Imposes an arbitrary and capricious penalty;

4. Is not only wholly without warning, but also contrary to what administrative practice had led the carriers rightfully to expect;

5. Upsets generally accepted Governmental and industry thinking and practice;

6. Not only fails to serve any national purpose, but, by in effect excluding U. S. merchant ships from the carriage of non-differential agricultural commodities, affirmatively harms the U. S. merchant marine.

The Cargo Preference Act, a highly important statute to the U.S. Merchant Marine, has never been considered by this Court. We submit that the opinion of the Court

of Appeals, with, as we see it, its narrow and mechanical construction of the relevant statutes should not be permitted to stand—with all its actual present damage to this small carrier and its immense potential damage to the U. S. merchant marine, certainly none too prosperous now. According to a public report issued by the Maritime Administration in 1964, the United States merchant marine has declined in tonnage relative to that of the entire world as follows (page 6):

Year	Total World	U. S. Privately Owned	Percent of World
1954	89,258,000	9,645,000	10.8
1959	117,640,000	9,519,000	8.1
1963	137,657,000	10,076,000	7.3

According to the same report (page 22), the percentage of United States foreign trade carried in U. S. flag liner service declined from 37.7 in 1954 to 29.2 in 1963, in U. S. flag irregular service from 17.8 in 1954 to 5.2 in 1963; and in U.S. flag tankers (which carry agricultural commodities as well as liquid cargo) from 23.0 in 1954 to 4.4 in 1963.

2. The Court of Appeals has decided, in conflict with applicable decisions of this Court, that rates otherwise fair and reasonable, have become unlawful because, in order to meet competition, a carrier charged lower rates for similar transportation.

Bloomfield charged the lower rates on commercial grain because that was all it could get: it was forced to charge the world market rate.

This Court has long recognized that when, in order to meet competition, lower rates have been charged for transportation comparable in the physical sense, the higher rate does not thereby become unlawful.

In *Texas & Pacific Ry. Co. v. Interstate Commerce Commission,* 162 U.S. 197, a case arising under §3 of the Interstate Commerce Act, forbidding unlawful preferences and corresponding to §§16 and 17 of the Shipping Act of 1916, this Court upheld, on the ground of competition, a rate for the carriage of goods inland from port cities when such carriage originated in that city higher than the rate applicable when the goods carried had been imported from abroad on a through bill of lading. ". . . [A] low rate to secure foreign freights which would otherwise go by competitive routes" was not "unjust". 162 U.S. 234.

In *Texas & Pacific Ry. Co. v. United States,* 289 U.S. 627, also arising under §3, the Court said at page 636:

> "The theory of the Act is that the carriers in initiating rates may adjust them to competitive conditions, and that such action does not amount to undue discrimination."

In *Ayrshire Collieries Corp. v. United States,* 335 U.S. 573, again construing §3, the Court said at page 592:

> ". . . Yet all that appellants attempt here is to show that discrepancies in rates are not warranted by any difference in transportation conditions or distance. That is not enough provided the Commission was justified in considering the element of competition.
>
> "We think it was . . ."

In *Interstate Commerce Commission v. Alabama Midland Ry. Co.*, 168 U.S. 144, this Court dealt with §4 of the Interstate Commerce Act, forbidding higher rates for a shorter haul *"under substantially similar circumstances and conditions."* In that case this Court upheld a higher rate for the carriage of goods from New York to Troy, Alabama, than to Montgomery, Alabama, although the trains ran right through Troy on their way to Montgomery, which was fifty-two miles further distant. The rationale of the decision was that lower rates to Montgomery were necessary to meet competition from water carriers and other railroads. 168 U.S. 166, 171-173.

These decisions have been many times followed, e.g., *Louisville & Nashville Railroad Co. v. Behlmer*, 175 U.S. 648; *Intermountain Rate Cases*, 234 U.S. 476, 482-483 (the cases are summarized at page 483).

The Court of Appeals cited *Wight** *v. United States*, 167 U.S. 512, involving shippers over the same line and involving a construction of §2 of the Interstate Commerce Act. But §2 of the Interstate Commerce Act has no counterpart in the Shipping Act of 1916. Moreover, this Court explained *Wight v. United States* in the *Alabama Midland Ry. Co.* case, saying that in the *Wight* case "there was no room for the operation of competition". 168 U.S. 167.

But in this instance all shippers not required to ship U. S. flag may freely avail themselves of foreign flag ships. Hence there is not only "room for competition", but exceedingly active competition.

As this Court said in *L. T. Barringer Co. v. United States*, 319 U.S. 1, 6:

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* Misspelled White by the Court of Appeals.

> "Section 2 [of the Interstate Commerce Act] is aimed at the prevention of favoritism among shippers."

Certainly it cannot be seriously suggested that Bloomfield charged world market rates on the commercial shipments out of favoritism. It charged those rates because those were the prevailing rates in the absence of a requirement that the grain be shipped U. S. flag.

3. The Court of Appeals has construed, in conflict with applicable decisions of this Court, the Supplier's Certificate without regard to the circumstances in which it was executed by Bloomfield.

As the Supplier's Certificate is a Government contract, its construction is a matter of federal common law. *United States v. Clearfield Trust Co.*, 318 U.S. 363.

According to this Court, *Nash v. Towne*, 5 Wall. 689, 699:

> "Courts, in the construction of contracts, . . . place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them and so as to judge of the meaning of words and the correct application of the language to the thing described."

Having regard to the circumstances in which Bloomfield signed the Supplier's Certificate, and the other portions of ICA Regulation 1 which expressly incorporate the Cargo Preference Act requirements, it could not have been intended by Bloomfield as, nor understood by ICA to be, an agreement to charge the same rate on this Government-aided agricultural commodity required to be shipped U.S.-flag as Bloomfield was then charging commercial shippers.

The U.S.-flag differential on agricultural commodities had been, as we have seen, well-known for a number of years to Congress, to the Government agencies concerned with the ocean shipping of agricultural commodities, and necessarily to the maritime industry. It can not have been within the remotest dreams of Bloomfield's agents that a customer not required to ship U.S.-flag was similarly situated to one who was.

And besides this general background, there were relevant particular factors. For a period of two years Bloomfield was simultaneously negotiating rates in the $10.50 area and signing Supplier's Certificates that, according to the Court of Appeals, constituted contracts to carry the same wheat for rates in the $5.50 area. How pointless the separate rate negotiations were if any such result had been intended by the parties or their negotiating agents!

4. The Court of Appeals has decided, in conflict with applicable decisions of this Court, that the general language of the Shipping Act of 1916 is applicable to matters arising under the specific Cargo Preference Act.

It is an elementary rule of statutory construction that:

> "Specific terms prevail over the general in the same or another statute which otherwise might be controlling." *Ginsberg & Sons v. Popkin*, 285 U.S. 204, 207.

This language was cited with approval by this Court in its recent decisions in *McEvoy v. United States*, 322 U.S. 102, 107, and *Bulova Watch Co. v. United States*, 365

U.S. 753, 758. Earlier decisions by this Court enunciating this rule are *Kepner v. United States*, 195 U.S. 100, 125; *Townsend v. Little*, 109 U.S. 504, 512.

Here the Cargo Preference Act provides that:

> ". . . [T]he appropriate agency or agencies shall take such steps as may be necessary and practicable to assure that at least 50 per centum of the gross tonnage of such . . . commodities . . . which may be transported on ocean vessels shall be transported on privately owned United States flag commercial vessels, *to the extent that such vessels are available at fair and reasonable rates for United States-flag commercial vessels* . . ."

According to this language the agency concerned should not ship U.S. flag at all, until it has ascertained that a U.S. flag ship is available at "fair and reasonable rates," as the CCC does. No retrospective review and no challenge for preference such as is provided by the Shipping Act of 1916 are contemplated.

The Shipping Act contemplates a rate standard, below which a carrier's rates in a particular instance may fall to benefit a favored customer. The Cargo Preference Act is the reverse. It contemplates a rate standard, i.e. the world market rate, above which, in a particular instance, viz., Government-aided cargo, the carrier's rates may rise for its own benefit. To hold that a carrier violates the Shipping Act, because, when the circumstances do not exist by reason of which it can charge a higher rate, it charges the standard rate, is, we submit, to pervert the Cargo Preference Act.

5. The Court of Appeals has, in conflict with applicable decisions of this Court, required a carrier to make restitution of rates collected with the sanction of federal agencies without a showing that equity and good conscience will be offended if the carrier retains the money.

In *Atlantic Coast Line v. Florida*, 295 U.S. 301, this Court denied restitution of moneys collected by a carrier under the sanction of an erroneous order of the Interstate Commerce Commission respecting rates. The Court said at page 301:

> "A cause of action for restitution is a type of the broader cause of action for money had and received, a remedy which is equitable in origin and function. [citations] *The claimant to prevail must show that the possessor will give offense to equity and good conscience if permitted to retain it* . . . The question no longer is whether the law would put him in possession of the money if the transaction were a new one. The question is whether the law will take it out of his possession after he has been able to collect it."

The District Court, finding that ICA had given its advance approval to the U.S.-flag rates and that Bloomfield had reasonably and in good faith believed itself entitled to charge U.S.-flag rates, refused "to grant a crippling $270,000 recovery" on the further ground that restitution would be inequitable (R. 408).

We submit that the general understanding in Congress, the interested Government agencies, the courts and the maritime industry, demonstrated herein, that U.S.-flag carriers were entitled to charge U.S. differential rates on agricultural commodities required to be shipped U.S.-flag, supports that conclusion.

Under these circumstances it would be inequitable to demand restitution of the U.S. flag differential of any carrier; it is doubly inequitable that, by obscure motivation, Bloomfield should be singled out for such harassment.

CONCLUSION

A Writ of Certiorari should be granted to review the decision of the United States Court of Appeals herein.

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